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IN THE

Supreme Court of the United States

October Term, 1957

No. 587

SUNSHINE BOOK COMPANY AND SOLAR UNION NATURISME, INC.,

Petitioners,

—against—

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY

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PETITIONERS' REPLY

Petitioners wish to reply briefly to contentions in the government's brief in each of the three main headings under which both parties have presented this case.

I.

In one breath the governments asserts that the petitioners do not raise any issue under the First Amendment (Br. 14). But in the next breath the government admits that the petitioners take the position that serious questions under the First Amendment will arise if the instant federal obscenity statute, 18 U. S. C. § 1461, 62 Stat. 768, 69 Stat.

183, is construed as other or more than a criminal statute (Br. 25).

The petitioners' position is plain enough: the instant federal obscenity statute is nothing but a criminal statute; to construe it as more than this would raise serious First Amendment questions (Pet. 20, 24-25); the Court in accordance with its settled practice will not so construe a statute. The petitioners presented this issue in the first subdivision of the first heading of their petition.

The government suggests that under the instant federal obscenity statute the Postmaster General has the power to censor unsealed mail (Br. 17-19). But as Circuit Judge Washington pointed out in his dissenting opinion, in which Chief Judge Edgerton and Circuit Judge Bazelon joined: ". . . In the first place, it is not at all clear that the Post Office Department possesses any power to censor any class of mail, sealed or unsealed. Certainly Congress has never given any such a power in so many words, nor has the Supreme Court ever expressly recognized the existence of such a power. . . ." (Pet App. I, 54-55).

The government characterizes the power of censorship which it claims for the Postmaster General as of "narrow scope" (Br. 26). This is an attempt at the creation of a myth, and a reference to the numerous publications which the Postmaster General has previously sought to exclude from the mails will explode it (see, e.g., Pet. 38). A further reference to the use of the mails by periodicals other than those of petitioners will demonstrate the catastrophic nature of the claimed power. Whereas 25% of the periodical *Sunshine & Health* and 30% of *Sun Magazine* were distributed by means of the mails, in the case of this

country's leading periodicals the situation is just the reverse: in the case of the majority of them, over 70% are distributed through the mails. Figures compiled and published by the Audit Bureau of Circulation reveal that as of December 31, 1956, the last period for which complete figures are available, the paid circulation and subscription circulation (for which the mails are used exclusively) for the country's leading 20 publications which use the mails was as follows:

Magazine	Total Paid Circulation	Mailed	% of Total
1. Reader's Digest	10,718,943	8,578,158	80
2. Life	5,738,226	4,786,573	83.4
3. Ladies' Home Journal	5,320,300	3,615,092	68
4. Saturday Evening Post	4,950,061	3,507,715	70.8
5. McCall's	4,830,102	3,315,899	68.6
6. Better Homes and Gardens	4,302,019	2,921,780	67.9
7. Look	4,191,057	3,353,740	80
8. TV Guide	3,837,511	915,844	23.8
9. Good Housekeeping	3,815,085	2,758,993	72.3
10. American Home	3,150,764	2,415,764	76.6
11. American Legion Magazine	2,741,243	2,741,118	99.9
12. Coronet	2,735,748	1,609,788	58.8
13. Household	2,692,575	2,084,020	77.3
14. True Story	2,688,987	1,230,693	45.7
15. Redbook	2,395,580	1,324,151	55.2
16. True	2,227,483	1,141,893	51.2
17. National Geographic	2,144,704	2,113,304	98.5
18. Time	2,059,536	1,813,463	88
19. Parent's Magazine	1,686,047	1,653,863	98
20. Boys' Life	1,466,041	1,458,227	99

From the standpoint of power over the contents of periodical publications, a cultural commissar could ask for no more than that which the government claims in the instant case for the Postmaster General. And a three week delay in the distribution of any of the above-named periodicals (the three weeks being a minimum period for a hearing by the government's own admission—ft. 13, Br. 23-4) would, for all practical purposes, amount to a destruction of the entire issue of any currently circulated periodical, particularly those circulated on a weekly basis and dealing with current events, since the private express statutes (18 U. S. C. §§ 1694, 1696 and 1697) would prohibit the publishers of those periodicals from utilizing any alternative method of distribution other than the mails during the period of delay caused by a hearing even if an alternative method were practicable.

II.

The government refers to petitioners' motion to the Solicitor of the Post Office Department for leave to introduce evidence on community standards as "ambiguously worded" (Br. 30). The petitioners' motion is entitled: "Motion for Leave to Submit Evidence on Community Standards" (J. A. 57). Its first sentence reads: "Now come the respondents [petitioners] and respectfully ask leave to submit evidence to show that their publications both in illustration as well as in text do not violate community standards" (*Ibid.*). It is difficult to see how the petitioners could have been more precise, particularly in the light of the subsequently decided case of *Roth* v. *United States*, 354 U. S. 476 (1957).

III.

The government challenges petitioners' statement that the Post Office Department in obscenity hearings wants no evidence (Br. 31 n. 16). Unhappily for the government this is the specific position which the Post Office Department took in writing. *Attorney General's Committee On Administrative Procedure, The Post Office Department*, 95-98 (1940). Moreover, the Post Office Department's practice in the instant and other cases bears out petitioners' statement.

In further exculpation of the procedure which the Post Office Department employed in the instant case the government points to the recently published regulations of the Post Office Department (22 F. R. 8999), applicable to obscene publications (Br. 31 n. 16). But these rules and regulations were published only last month—after the petition for a writ of certiorari was filed in this case. Indeed, when counsel for petitioners read about the newly published regulations he speculated whether the instant petition had produced them. The government now concedes that it at least played a part (Br. 31 n. 16). However, this does not alter the fact that at the time of the so-called hearing in the instant case there were no such published rules or regulations; and that in this respect the procedure in the purported hearing violated § 3(a)(2) of the Administrative Procedure Act. 5 U. S. C. § 1002(a)(2), 60 Stat. 238.

The government points proudly to the fact that the Post Office Department's hearing examiner stated that the burden of proof to establish non-mailability rested on the Department. In view of the fact that at a gathering to

determine mailability all evidence is to be excluded save the challenged publications, a statement as to burden of proof is meaningless.

CONCLUSION

The petition for a writ of certiorari in this case should be granted; and the Court should rule that the instant federal obscenity statute with criminal sanctions, 18 U. S .C. § 1461, 62 Stat. 768, 69 Stat. 183, is only a criminal statute, and does not additionally empower the Postmaster General to censor the contents of any class of mail sealed or unsealed.

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